

COLUMBIA LAW REVIEW

Vol. 63

APRIL 1963

No. 4

SYMPOSIUM ON THE MODEL PENAL CODE

FOREWORD

HERBERT WECHSLER*

The Model Penal Code, approved last May by the American Law Institute, is the product of many heads and many hands. As is the case with all work of the Institute, initial formulations were the task of the reporters, aided by consultants of their choice. Cynical acid was applied to these submissions by three separate groups of critics: a strong Advisory Committee; the Council of the Institute; and, finally, the membership in annual meeting.

Much that was first proposed was totally rejected in this process. Little survived that was not altered or reshaped. The Institute was not, moreover, the sole agency of critical evaluation. As interested groups or individuals became aware of the existence of the tentative drafts, matters on which they expressed concern were reconsidered. This was particularly helpful in the case of the correctional provisions, which were continuously re-examined and revised in light of the objections and suggestions of officials working in that field.

Group work of this kind draws strength from the consensus it has nourished and reflected in a decade of development. It pays for this, however, by the sacrifices made as the consensus was attained—not alone the imperfections likely to inhere in compromise solutions, but also those produced by sheer exhaustion: the need to put an end to effort in the interest of the other things that must be done. It is well that this be said, lest “model” be conceived as a pretense of excellence that is beyond improvement. We say no more for the “Official Draft” than that it is the best that we could do, given the time and the resources that we had. Thus, it does not depreciate these models (the plural is employed since many portions of the Code can be considered separately) or weaken the faith that they are worthy of adoption or, at least, of adaptation, to say that they will profit from the close critique of the profession and the schools. To stimulate that critique was, indeed, one of the objects of the Institute in undertaking preparation of the Code. The

* Harlan Fiske Stone Professor of Constitutional Law, Columbia University; Chief Reporter, Model Penal Code; Director, The American Law Institute.

articles presented here do not, of course, exhaust the possibilities of critical evaluation. They do, I think, provide an interesting start.

I am grateful to Professor Packer for perceiving and articulating so felicitously the attitude—I shall not say philosophy—that animated work upon the Code. The words “principled pragmatism” are, of course, Mr. Packer’s, but Browning no more eagerly embraced his reader’s version of the meaning of his poem than I adopt this statement of the underlying theory of the draft. An enterprise in which Judge Learned Hand participated actively for many years could not but seek to eschew dogmatism insofar as possible, in favor of a spirit of accommodation. But that the spirit should be visible to others in the final product is, indeed, a reassuring sign. That it is well reflected in the way the Code has treated sex and morals offenses, Professor Schwartz’s paper on that subject surely shows. That paper speaks so clearly for itself that I shall not presume to add a word.

I also am indebted to Professor Packer for his exposition of the culpability provisions, which he correctly deems a fundamental feature of the Code. His paper will assist the reader in evaluating Mr. Kuh’s attack on these provisions as the “envy” of “monastics” given to “debating the number of angels who might dance on the head of a pin.”¹ Here, as in his similar denunciation of the article on justification, Mr. Kuh purports to be concerned with the complexity of formulation—a concern exacerbated by his sense that judges will be forced to charge lay juries in the general and abstract language of the Code. The answer is, of course, that it is not envisaged that the court would labor under such compulsion. The general provisions call for adaptation in the charge to the particulars presented in the case and should be dealt with only insofar as relevant to the specific issues posed. If, as Mr. Kuh insists, this concept is “impractical,” there is, indeed, a grievous flaw. It may, however, be that Mr. Kuh is here exemplifying Robert Maynard Hutchins’ quip that frequently “practical men are those who practice the errors of their forefathers.”²

There is some evidence of this in Mr. Kuh’s suggestion that it is neither “poor law” nor productive of jury confusion for the judge merely “to inform the jurors that criminal intent is necessary, and to further instruct them that a person is presumed to intend the natural consequences of his acts.”³ If there is anything that is impractical, in the sense that its difficulties are recurrently exemplified in practice when a genuine *mens rea* problem is presented, it is this. You will recall that it was Mr. Justice Jackson, not a schoolman, who referred to the “variety, disparity and confusion” of judicial

1. Kuh, *A Prosecutor Considers the Model Penal Code*, 63 COLUM. L. REV. 608, 621 (1963).

2. HUTCHINS, *NO FRIENDLY VOICE* 156 (1936).

3. Kuh, *supra* note 1, at 621.

"definitions of the requisite but elusive mental element" in crime.⁴ The effort to rationalize those definitions in the Code met no dissent from sitting judges or practitioners within the Institute, who asked no more than that the definitions be as simple as the complexity of the problems allowed. They would, I think, have shared the view that Stephen stated many years ago, as follows:

There is no doubt something attractive at first sight in broad and apparently plain enactments. Further acquaintance with the matter shows that such enactments are in reality nothing but simple and therefore deceptive descriptions of intricate subjects.⁵

To avoid such deceptive simplicity by revealing and resolving hidden issues was one of the important objects of the Code. It is well, therefore, that the problem should be faced as fully as it is in this discussion of the draft.

I have dwelt on the broadest issue raised by Mr. Kuh because I think acceptance of his point of view would raise a solid barrier to all but the most marginal improvement in our shabby, accidental, and outmoded penal codes. Having said this, however, I should add that I submit no more than that the generality and the extensiveness of the Code's treatment of pervasive issues is both necessary and desirable. I do not doubt that greater clarity, simplicity, or even, in some cases, specificity are well worth further effort to attain. That is a matter to be dealt with by particular proposals, not by general attack upon the Code. Mr. Kuh, however, offers no proposals of this kind.

This is not the place to deal at length with all the concrete questions raised in these impressive papers but I shall comment briefly on a few that seem to me to be of special interest.

Professor Packer's doubt about the way the Code has dealt with drunkenness as a defense—in refusing to permit such evidence to rebut the awareness of the risk that otherwise would be an element of recklessness—certainly offers food for thought. He will, I think, be pleased to know that the same doubt was felt by Judge Learned Hand, who thought this special rule devoid of principle. I doubt, however, that those who believed it right to postulate a general equivalence—with respect to culpability—between the risks created by the conduct of the drunken actor and those implicit in his conduct in becoming drunk would have accepted a presumption of awareness, which Professor Packer urges, as an adequate solution of the problem. I was myself so eager to dispel the current mumbo-jumbo that drunkenness may rebut "specific" but not "general" intent, that I was willing to concede the substance of the point to gain the clarity the Code achieves.

Professor Hall's renewed attack upon accepting negligence as a suf-

4. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

5. STEPHEN, 3 HISTORY OF THE CRIMINAL LAW OF ENGLAND 356 (1883).

ficient mode of culpability raises an issue to which admittedly there can be no easy answer. His argument is marred for me by misinterpretation of the Code provision to apply to "ordinary negligence, as that is understood in the law of torts."⁶ The Code deliberately requires "a gross deviation from the standard of care that a reasonable person would observe in the actor's situation,"⁷ and that plainly calls for more than simple negligence. It is, however, true that actual awareness of the relevant risk is not required; it is sufficient that the actor should have been aware. Thus much that Mr. Hall says still has point; the Code would simply call for more egregious inadvertence than his comment presupposes.

The Code's response to those who urge that inadvertence never should suffice for penal liability may be expressed in a few words and they are all that would be said:

Knowledge that conviction and sentence may follow conduct that inadvertently creates improper risk does supply men in some degree with an incentive to take care to use their faculties and draw on their experience in gauging the potentialities of contemplated conduct. To some extent at least, this motive may promote awareness and thus yield some added measure of control. Moreover, inattention may be due to lack of caring about other people's interest and not merely to an intellectual failure of grasp. To deny that legislation ever may act properly on these assumptions thus appears excessively dogmatic. On the other hand, it is entirely right that liability for negligence should be deemed the exceptional and not the ordinary case and should not lightly be imposed.⁸

I understand the view that this does not provide sufficient basis for a just punitive condemnation, though limited to extreme cases—as the Code provision is—I think it does. Professor Hall makes other points, however, that I do not understand. If the deterrent justification is accepted, he asks, "why the slight penalty for negligent damage"; "why restrict penalization for negligence to a few specified crimes; why not extend it generally?"⁹ He hardly can be serious in this. Punishment is mitigated because sentence must take due account of the quality of the offense and what it shows about the actor's character. And liability for negligence is properly restricted to those cases in which the need for this exceptional protective effort is most strongly felt or in which the liability would otherwise be absolute or in which the risk of incurring liability on such a basis will not also bear too heavily on useful types of conduct. Are these not variables that should properly be given

6. Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 COLUM. L. REV. 632, 633 (1963).

7. MODEL PENAL CODE § 2.02(2) (d) (Off. Draft 1962).

8. Wechsler, *On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code*, 339 ANNALS 24, 31 (1962). See also MODEL PENAL CODE § 2.02, comment 3 at 126-27 (Tent. Draft No. 4, 1955).

9. Hall, *supra* note 5, at 641.

weight? Finally, I cannot really think there is a point in the assertion that "the inclusion of negligence bars the discovery of a scientific theory of penal law"¹⁰ Penal law theorists, who think that theory is the exposition of the law that is, can hardly ask that legislation be so framed that it will simplify their work.

Professor Fox's paper deals with another narrow but important problem in the field of culpability: the question whether an actor whose consciousness is so impaired that he functions in what the British have been calling a state of automatism has a defense upon the ground that his conduct does not involve a voluntary act or only on the ground of mental disease that excludes responsibility. The issue has a practical significance in any jurisdiction where the burden of persuasion as to irresponsibility is placed on the defendant, as in England and some half of our states, or where a special verdict of insanity has been adopted or where an acquittal on that ground calls for commitment to a mental hospital, as is increasingly the case. The two latter problems, though not the former, are presented under the provisions of the Code.

There can be no sweeping resolution of the difficulty unless we are prepared to say that whenever evidence that leads to an acquittal points to a physical or mental state that portends future danger to the public, the defendant should be committed to a mental hospital. Some have considered this to be the proper answer and the House of Lords has recently so narrowed the occasions when the issue of automatism must be submitted to the jury as to reach approximately that result.¹¹ The Code does not, however, go that far, conceiving that "unconsciousness" excluding voluntary action is an extreme conception, unlikely to be found in cases in which there is no physical collapse. That this may not be a sufficient answer, particularly in some epileptic trances, must, however, be conceded, though whether these are cases in which commitment is in order is a matter that assuredly is far from clear. Professor Fox does not himself propose a solution to the problem, but his paper persuades me that it requires further thought.

* * *

What has been said does not, by any means, canvass the issues raised in the succeeding pages. I hope it whets the reader's appetite to reflect and explore. For penal law, like war, is too important to be left to specialists. It calls for the sustained attention of both bench and bar as guardians of public interest.

10. *Id.* at 643.

11. *Bratty v. Attorney-General for Northern Ireland*, [1961] 3 Weekly L.R. 965 (H.L.)